

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DILLON B. MCGARVEY**  
Claimant

VS.

**FOOT LOCKER RETAIL, INC.**  
Respondent

AND

**AMERICAN CASUALTY CO. OF READING, PA**  
Insurance Carrier

Docket No. 1,035,541

**ORDER**

Respondent and its insurance carrier (respondent) request review of the August 9, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

The Administrative Law Judge (ALJ) found that the claimant suffered an accidental injury arising out of and the course of employment with the respondent and that notice was timely given. Claimant was then granted temporary total disability benefits and medical treatment was ordered.

The respondent requests review of this Order alleging the claimant failed to adequately establish that he sustained a personal injury by accident on June 27, 2007 or that timely notice was provided. Accordingly, respondent contends the Order should be reversed.

Claimant argues that the Order should be affirmed in all respects.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant alleges he sustained a shoulder injury while working on June 27, 2007. While unloading a box he tripped, falling to the floor. He further alleges that just after the accident he told his supervisor, Don Wilson, of the injury and was told to come back later as Mr. Wilson was busy. Shortly thereafter, Mr. Wilson retrieved claimant and the two proceeded to the personnel office where claimant was advised by Jerome Barber, the operations manager, that he was being terminated for excessive absences.

Claimant concedes that before June 27, 2007 he had been counseled for excessive absences. Claimant also admits that at this meeting with Mr. Wilson and Mr. Barber when he was being counseled for his absenteeism, he did not express again that he had suffered an injury. Rather, he advised that he would be retaining a lawyer.

Claimant went home and returned to respondent's business with his wife, who went in to respondent's business and asked for some paperwork to explain claimant's termination. It was agreed that there would be a meeting the next day, June 28, 2007.

Claimant returned to respondent's business on June 28, 2007 and testified that he came with a letter advising respondent of his work-related injury. The letter, drawn up at his lawyer's direction, is dated June 27, 2007 at the top but at the bottom the date of June 28, 2007 is listed. In any event, claimant failed to give this sheet to anyone at the meeting. At the close of the meeting claimant was escorted from the premises.

Claimant says he remembered that he needed to give the paper to respondent and when he tried to do so, he was refused entry to the premises and his paper was refused. And for whatever reason, claimant failed to mail the letter.

Nothing more occurred until July 13, 2007 when claimant was seen by a physician, at the request of his lawyer. This physician identified a "right shoulder injury" and indicates that the injury is the result of a "work related fall".<sup>1</sup> This same report contains claimant's recitation of his injury -

. . . [claimant] states that he was working there and tripped and fell and landed on the right side of his body. He noted immediate pain in his right shoulder.<sup>2</sup>

This recitation is consistent with claimant's testimony at the preliminary hearing. Claimant further explained that he did not ask for treatment from the plant nurse on June 27, 2007 because the pain was not that serious. It was only after that day that the pain significantly increased.

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<sup>1</sup> P.H. Trans., Cl. Ex. 2 at 2 (IME Report).

<sup>2</sup> *Id.*, Cl. Ex. 2 at 1.

After hearing this testimony the ALJ concluded that claimant had sustained his burden of establishing that he sustained an accidental injury arising out of and in the course of his employment with respondent on June 27, 2007 and that he gave notice as required by the statute, K.S.A. 44-520. After considering the parties' briefs and the evidence contained within the record to date, this Board Member finds the ALJ's preliminary hearing Order should be affirmed.

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arising out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.<sup>3</sup>

Here, claimant has testified to the time, date and mechanism of injury. His recitation is consistent with the history taken by the physician on July 13, 2007. There is no evidence or explanation that would otherwise explain claimant's right shoulder complaints other than the fall on June 27, 2007. While it is certainly problematic that claimant waited a number of weeks from the date of his accident to see a physician, under these facts and circumstances as presently developed, that fact alone does not defeat this claim. Thus, the ALJ's finding that the claimant sustained an accidental injury arising out of and in the course of his employment is affirmed.

This Board Member likewise affirms the ALJ's conclusion as to timely notice. K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as

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<sup>3</sup> *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that he told Don Wilson of his injury. And Don Wilson has not denied this allegation. Thus, claimant's testimony is uncontroverted. While claimant admits he did not tell Mr. Barber that same day and there is some dispute about the information exchanged at a meeting on the 28<sup>th</sup> of June, the unchallenged fact remains that claimant advised Don Wilson of the injury that same day, June 27, 2007. Unless and until Mr. Wilson testifies, or claimant's credibility is so significantly eroded that his testimony is unreliable, then the ALJ acted appropriately in finding that the statutory notice was provided in a timely manner.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>4</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated August 9, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2007.

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BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant  
John C. Kennyhertz, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge

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<sup>4</sup> K.S.A. 44-534a.